



Global Tax Update

India

Deloitte Tohmatsu Tax Co.

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1. Delhi High Court ruled on the issue of Association of Person (AOP)¹

The Delhi High Court has recently held that where a Joint Venture (JV) was formed only to secure contract and where the scope of each JV partner's task was distinctly outlined, entire work was split between two JV partners and they completed task, through sub-contractors, JV was not an AOP and not liable to be taxed on that basis.

AOP, under the Indian tax laws is a separately taxable entity which is formed by two or more persons who join together for certain common purpose. This is distinct from a partnership.

In this case, the taxpayer was a JV between two companies formed to undertake some road projects. 98% of the contract revenue was debited towards the sub-contractors, i.e. JV partners and the balance receipts were utilized towards payment of VAT, etc. Therefore, tax return of the JV did not report any income.

The tax officer held that a proportion of the project receipts should be attributed to the taxpayer to whom tender was awarded for the project. Accordingly, 5% of the gross contractual receipts were taxed in taxpayer's hands in status of AOP.

The High Court relied on the decision in the case of Linde AG² wherein it was observed that unless the facts lead to a conclusion that there is sufficient joint participation for a common enterprise, it would not be appropriate to treat two or more persons as an AOP for the purposes of taxing them as separate taxable entity. Treating every instance of such co-operation between two or more persons as resulting in an AOP would militate against the purpose of considering an association as a separate tax entity. A mere co-operation of one person with another in serving one's business objective would not be sufficient to constitute an AOP merely because the business interests are common. A common enterprise, which is managed through some degree of joint participation, is an essential condition for constituting an AOP.

Accordingly, the Delhi High Court, looking in the facts of the case, opined that the JV was formed only to secure the contract, in terms of which the scope of each JV partner's task was distinctly outlined. Further, the entire work was split between the two JV partners; they completed the task, through sub-contracts and were responsible for the satisfaction of the customer. Therefore, the High Court applying the principles of the law declared in Linde AG, held that the JV was not an AOP.

1 Source: CIT vs. Oriental Structural Engineers (P) Ltd. [2015] 58 taxmann.com 77 (Delhi High Court)

2 Linde AG, Linde Engg. Division v. DDIT [2014] 44 taxmann.com 244 (Delhi)

2. Bangalore Tribunal ruled that withholding at higher rate of 20% not applicable when DTAA benefits are available³

The Bangalore Tribunal in the case of Infosys BPO has held that there is no scope of withholding tax at the rate of 20% as per section 206AA of the Income-tax Act, 1961 (the Act) when the benefit under Double Taxation Avoidance Agreement (DTAA) is available to the taxpayer.

Per section 206AA, if the payee does not have a Permanent Account Number (PAN), then the withholding tax rate under the DTAA is ignored and the withholding @20% or higher becomes applicable.

The Indian company in this case made payment to some non-resident companies on account of royalty and fees for technical services without obtaining PAN of the non-resident payees. The tax officer alleged that in the absence of PAN, per section 206AA of the Act, withholding should have been @20%, and the rate mentioned under the DTAA should have been ignored. Further, interest was charged on short deduction.

The Bangalore Tribunal, in this case, held that the tax liability of the recipients could not be more than the rate prescribed under the DTAA or the Act, whichever is lower. Therefore, there is no scope of withholding at the rate of 20% as per section 206AA when the benefit under DTAA is available.

³ Source: DCIT vs. Infosys BPO Limited [2015] ITA No.: 1143B/2013

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Contacts

Deloitte Tohmatsu Tax Co.

India Practice

Hiroyuki Hayashi, Partner hiroyuki.hayashi@tohmatu.co.jp

Issued by

Deloitte Tohmatsu Tax Co.

Tokyo Office

Shin-Tokyo Building 5F, 3-3-1, Marunouchi, Chiyoda-ku, Tokyo 100-8305, Japan

T e l : +81 3 6213 3800

email : tax.cs@tohmatu.co.jp

Corporate Info. : www.deloitte.com/jp/en/tax

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